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No. 92-214

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

CURATORS, UNIVERSITY OF MISSOURI, PETITIONERS

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Provider Reimbursement Review Board lacks jurisdiction over a hospital's claim for reimbursement where the claim was denied by a fiscal intermediary because the services at issue were not covered by the Medicare Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 963 F.2d 220. The order of the district court (Pet. App. B1-B19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1992. On June 9, 1992, the court of appeals issued an order denying petitioners' suggestion of rehearing en banc. Pet. App. A7. Although no petition for rehearing had been filed, the order of June 9, 1992, stated that "[t]he petition for rehearing is also denied." Pet. App. A7. The petition for a writ of cer-

tiorari was filed on August 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners operate the University of Missouri Medical Center in Columbia, Missouri. From 1979 through 1981, the Medical Center participated in a sharing arrangement with a nearby Veteran's Administration Hospital, under which the VA hospital performed pulmonary intensive care unit (PICU) services for the Medical Center's patients. The Medical Center filed cost reports with the Department of Health and Human Services' designated fiscal intermediary, Blue Cross/Blue Shield of Missouri, requesting payment under the Medicare Act, 42 U.S.C. 1395 *et seq.* The fiscal intermediary denied the Medical Center's requests for reimbursement related to the PICU services. The intermediary explained that the PICU "unit does not qualify as a provider cost center, as it is physically located in the Veteran's Administration Hospital," and the Medicare Act forbids reimbursement for services provided by federal entities, 42 U.S.C. 1395y(a)(3) (1988 & Supp. II 1990) and 42 U.S.C. 1395f(c). The intermediary also informed the Medical Center that if it wished to contest this determination, "appeal is to the Provider Reimbursement Review Board" (PRRB). Pet. App. A2-A3, B2, B8-B10.

Petitioners challenged the denial of reimbursements before the PRRB. The fiscal intermediary initially questioned the PRRB's jurisdiction, noting that the claim concerned the issue of whether the services in dispute were covered by the Medicare Act and therefore fell outside the PRRB's limited authority to review determinations of the reasonable cost of services that are covered. The intermediary

later moved to dismiss on the ground that the PRRB lacked jurisdiction. The PRRB granted that motion, and petitioners sought review in the district court. Pet. App. A3, B9-B10.

The district court upheld the PRRB's determination that it lacked jurisdiction to review the fiscal intermediary's denial of reimbursement for the PICU services. The court concluded that "[t]he undisputed facts show that coverage issues are involved in this case." Pet. App. B15. Because the governing statute, 42 U.S.C. 1395*oo*(g)(1), expressly deprives the PRRB of jurisdiction to review determinations that services were not covered by the Act, the district court concluded that the PRRB lacked jurisdiction. The district court also rejected petitioners' argument that the government was estopped from contesting the PRRB's jurisdiction, noting that "[a] prior erroneous decision of the intermediary or the PRRB cannot confer subject matter jurisdiction where it does not exist." Pet. App. B18.

The court of appeals affirmed. Pet. App. A1-A6. The court adopted the reasoning of *Highland Dist. Hosp.* v. *Secretary of HHS*, 676 F.2d 230 (1982), in which the Sixth Circuit held that a denial of reimbursement based on lack of coverage is not within the appellate jurisdiction of the PRRB. Because 42 U.S.C. 1395*oo*(g)(1) specifies that issues relating to whether a given service is covered by the Medicare Act "shall not be reviewed by the Board," the court of appeals held that PRRB review is limited to evaluating determinations regarding the reasonable cost of services. The court concluded that "[i]t is clear from the analysis in *Highland* and our own reading of § 1395oo that the PRRB has no discretion to hear coverage claims." Pet. App. A5.

The court of appeals also rejected petitioners' argument that the determination that the PRRB lacked jurisdiction was inequitable. The court noted that the fiscal intermediary's filings and the Sixth Circuit's decision in *Highland* "should have made [petitioners] aware of the likelihood the PRRB would dismiss the appeal for lack of jurisdiction." Pet. App. A6. The court went on to suggest that petitioners "had the opportunity to dismiss the PRRB appeal and pursue payment directly from its patients." *Ibid.* Although the court observed that petitioners are now unlikely to recover their costs, the court concluded that it would "not force the PRRB to accept jurisdiction over coverage issues." *Ibid.*

ARGUMENT

1. The Medicare Act provides that a denial of payment by a fiscal intermediary "because such items or services are listed in Section 1395y of this title shall not be reviewed by the Board." 42 U.S.C. 1395*oo*(g)(1); see also 42 C.F.R. 405.1873(b). Here, payment for the PICU services was denied because the services were excluded from coverage by Section 1395y(a)(3), which prohibits (with certain exclusions not relevant here) payment for services "paid for directly or indirectly by a governmental entity." 42 U.S.C. 1395y(a)(3) (1988 & Supp. II 1990). Because Congress expressly denied the PRRB jurisdiction over coverage claims like the one at issue in this case, the "presumption of review" relied on by petitioners (Pet. 8) is rebutted.

2. Petitioners protest that "[t]he Medical Center has not been paid for services it delivered and has been denied review of this nonpayment." Pet. 24. The Medical Center's right to payment and its right to review are subject to the specific provisions of the

Medicare Act. The fiscal intermediary correctly determined that the Medicare Act does not cover services provided by a federal entity such as the VA Hospital. See 42 U.S.C. 1395f(c); 42 U.S.C. 1395y(a)(3) (1988 & Supp. II 1990). And, as the court of appeals correctly concluded (Pet. App. A5), the PRRB lacks jurisdiction to review coverage determinations. 42 U.S.C. 1395*oo*(g)(1); see 42 C.F.R. 405.1873(b)(1) (coverage determinations "shall be reviewed only in accordance with the applicable provisions of [42 C.F.R. Pt. 405, Subpts. G and H]").

Petitioners do not directly challenge that conclusion. Petitioners instead argue (Pet. 12-18) that the court of appeals erred in suggesting that the Medical Center "had the opportunity to dismiss the PRRB appeal and pursue payment directly from its patients." Pet. App. A6. Petitioners observe that proceeding directly against individual patients would require the fiscal intermediary to notify those patients, Pet. 13-14, and the intermediary determined in 1985 that such notification "would be administratively impracticable and cost prohibitive" because of the passage of time, workload, and administrative priorities. Pet. 15-16. All that, however, is beside the point. As the court of appeals ultimately stated, the Medical Center's inability to recover costs directly from the patients "cannot nullify the statute nor vest the PRRB with jurisdiction." Pet. App. A5.*

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* Even if the Medical Center's practical ability to obtain patient reimbursement were relevant, the fiscal intermediary's determination that it was impractical to allow the Medical Center to proceed directly against its patients in 1985 (more than four years after the fiscal intermediary adjusted the Medical Center's claim, Pet. App. B9) did not mean that it would have been impractical to do so at an earlier date. The Medical Center chose to initiate and continue proceedings

3. Petitioners erroneously contend that the court of appeals' decision conflicts with *Highland Dist. Hosp.* v. *Secretary of HHS*, 676 F.2d 230 (6th Cir. 1982). In *Highland*, as in the instant case, the court of appeals determined that the PRRB has no jurisdiction to review a dispute over whether a particular service was covered under the Medicare Act. See 676 F.2d at 236 ("PRRB review is limited to issues of cost reasonableness and the amount of reimbursement due a provider for admittedly covered services."). The court below specifically "adopt[ed] the conclusions of [the *Highland*] court," and it rejected petitioners' attempts to distinguish that case. Pet. App. A4. The agreement between the decision below and *Highland* renders review all the more unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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before the PRRB, notwithstanding a statute and regulations to the contrary and the intermediary's statement before the PRRB that the Board lacked jurisdiction (see *id.* at B10), and petitioners are ultimately responsible for that choice.